Dissenting Views to H.R. 1115, "The Class Action Fairness Act of 2003"

We strongly oppose H.R. 1115, the so-called "Class Action Fairness Act of 2003." Although the legislation is described by its proponents as a simple procedural fix, in actuality it represents a major rewrite of the class action rules that would bar most forms of state class actions and massively tilt the playing field in favor of corporate defendants in both class action and non-class action cases. H.R. 1115[1] is opposed by both the state[2] and federal[3] judiciaries; consumer and public interest groups, including Public Citizen,[4] Consumers Union,[5] the Consumer Federation of America and U.S. PIRG;[6] a coalition of the most well known environmental

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[1]H.R. 1115 is the fourth time class action legislation has been offered in Congress. However, as discussed later, it is the most far reaching of any class action bill ever considered by the House, because it would apply to pending cases. During the 105th Congress, the Full Committee marked-up and reported out on a party line vote the "Class Action Jurisdiction Act of 1998," which was also similar in most other respects to H.R. 1115. The bill, however, was never considered by the Full House during the 105th Congress. In 1999, after a hearing and mark-up, the House Committee on the Judiciary reported out, by a 15-12 vote, the "Interstate Class Action Jurisdiction Act of 1999," which was similar in most other respects to H.R. 1115 under consideration today. On September 23, 1999 the House passed the legislation 222-207. It was never voted on in the Senate. During the 106th Congress, the House passed H.R. 2341, the "Class Action Fairness Act of 2001," (identical in most other respects to this bill) by a vote of 233 to 190. While the Senate Judiciary Committee held a hearing on the bill, it did not take any further action.

[2]*See* Letter from Annice M. Wagner, President, Conference of Chief Justices (March 28, 2002) [hereinafter Conference of Chief Justices letter] (calling the bill "an unwarranted incursion on the principles of judicial federalism") (on file with the minority staff of the House Judiciary Committee).

[3]*See* Letter from Leonias Ralph Mecham, Secretary, Judicial Conference of the United States (March 26, 2003) [hereinafter "Mecham letter"] (stating the conference's continued opposition to this legislation); Letter from Anthony J. Scirica, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States [hereinafter Scirica letter] (requesting that the Judiciary Committee withdraw provisions of the bill because they conflict with current rules of practice and procedure) (both on file with the minority staff of the House Judiciary Committee).

[4]*See* Testimony of Brian Wolfman, Staff Attorney, Public Citizen Litigation Group, before the House Judiciary Committee (May 15, 2003) [hereinafter "Wolfman"].

[5] *See* Letter from Sally J. Greenberg, Senior Product Safety Counsel, Consumers Union (May 14, 2003) [hereinafter Consumers Union Letter] (on file with the minority staff of the House Judiciary Committee).

[6]Letter from Rachel Weintraub, Assistant General Counsel, Consumer Federation of America, and Edward Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group

advocates;[7] health advocates, including the American Heart Association, Campaign for Tobacco Free Kids, and the American Lung Association;[8] and civil rights groups, such as the Leadership Conference on Civil Rights[9] and the Lawyers' Committee for Civil Rights.[10] It is also opposed by some of the nation's most prestigious editorial boards.[11]

By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation. This legislation will undercut that important principle by making it far more burdensome, expensive, and time-consuming for groups of injured persons to obtain access to justice. Thus, it would be more difficult to protect our citizens against violations of fraud, consumer health and safety, civil rights and environmental laws. The legislation goes so far as to prevent state courts from considering class action cases that involve solely violations of state laws, such as state consumer protection laws.

(May 14, 2003) [hereinafter CFA/PIRG letter] (on file with the minority staff of the House Judiciary Committee).

[7]Letter from Joan Mulhern, Senior Legislative Counsel, Earthjustice Legal Defense Fund; Richard Wiles, Senior Vice President, Environmental Working Group; Debbie Sease, Legislative Director, Sierra Club; Eric Olson, Senior Attorney, National Resources Defense Council; Lexi Schultz, Legislative Director, Mineral Policy Center; Anna Aurillo, Legislative Director, U.S. Public Interest Research Group; Sara Zdeb, Legislative Director, Friends of the Earth; Rick Hind, Legislative Director, Greenpeace; Paul Schwartz, National Campaigns Director, Clean Water Action (April 2, 2003).

[8]Letter from M. Cass Wheeler, CEO, American Heart Association; John L. Kirkwood, President and CEO, American Lung Association; and Matthew L. Myers, President Campaign for Tobacco-Free Kids (March 10, 2003).

[9]Letter from Leadership Conference on Civil Rights, Lawyers Committee for Civil Rights under Law, et al. (May 14, 2003) (on file with the minority staff of the House Judiciary Committee).

[10] *Id.*

[11]*See e.g.*, "The Class Action Unfairness Act," Editorial, *New York Times*, April 25, 2003; "Unfair Federal Fairness Act," Editorial, *Milwaukee Journal Sentinel*, April 10, 2003; "Threat to Class Actions," Editorial, *Los Angeles Times*, April 9, 2003; "Courts and torts: Citizens' rights suffer if Congress sends all class-action suits to federal court," Editorial, *Philadelphia Inquirer*, May 16, 2003; "Dubious Class Actions, " Editorial, *Salt Lake Tribune*, May 12, 2003; "'Fairness' to Whom? Congress Intrudes on State Prerogatives in Class-action bill," Editorial, *Columbus Dispatch*, May 8, 2003; "DECLASSE: Nominal Conservatives Assault Onmce Cherished Federalism," Editorial, *Houston Chronicle*, April 29, 2003; and "Class Action Unfairness," Editorial, *Palm Beach Post*, May 15, 2003.

In a marked affront to federalism, H.R. 1115 provides for the removal of state class action claims to federal court in cases involving violations of state law where any member of the plaintiff class is a citizen of a different state than any defendant.[12] Any plaintiff or defendant could petition a state court to remove the class action to federal court as a matter of right.[13] The only exceptions provided in H.R. 1115, directing federal courts to abstain from hearing a class action, are: (1) when a "substantial majority" of the members of the proposed class are citizens of a single state of which the primary defendants are citizens and the claims asserted will be governed primarily by laws of that state ("an intrastate case"); (2) when all matters in controversy do not exceed $2,000,000 or the membership of the proposed class is less than 100 ("a limited scope case"); or (3) when the primary defendants are states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief ("a state action case").[14] In the event the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Procedure 23, under the bill the court must dismiss the action,[15] effectively striking the class action claim.[16]

In an amazing act of Congressional arrogance, the legislation – unlike predecessor versions of the bill and unlike legislation pending in the Senate[17] – would apply to pending cases.

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[12]H.R. 1115, § 4(a). Current law requires there to be complete diversity (all of the plaintiffs must be citizens residing in different states than all of the defendants) before a state law case is eligible for removal to federal court. *See Stawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Snyder v. Harris*, 394 U.S. 332 (1969), the Supreme Court held that the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.

[13]At markup, Mr. Watt offered an amendment, defeated by voice vote, that would have limited this right to a representative class member. This would have avoided the perverse result where a plaintiff, not at all involved in the day-to-day workings of the action, could derail an entire case by having it removed to federal court.

[14]H.R. 1115, § 4(a). The legislation also excludes securities-related and corporate governance class actions from coverage and makes of number of other procedural changes, such as easing the procedural requirements for removing a class action to federal court (*i.e.*, permitting removal to be sought by any plaintiff or defendant and eliminating the one-year deadline for filing removal actions) and tolling the statute of limitation periods for dismissed class actions.

[15]H.R. 1115, § 4(a).

[16]While the class action may be refiled again, any such refiled action may be removed, thereby resulting in a "merry-go-round" in which class members revolve between state and federal court on procedural grounds while never reaching a decision on the merits of their claim.

[17]Introduced on February 4, 2003, S. 274 was marked up and reported out on June 2, 2003. Two amendments were adopted by the Senate: Sen. Feinstein's amendment, which modifies that jurisdictional section of the bill to bring more certainty to the process, and to keep more cases in

As such, it would work to the benefit of corporate criminals and scam artists, like Enron, Adelphia and Tyco–by throwing pending lawsuits brought by defrauded investors out of state court, and by subjecting even pending federal and state class actions to the new provisions encouraging delay by defendants (described below).

In addition, the bill goes far beyond class action jurisdiction issues and includes numerous additional provisions that favor corporate defendants over harmed consumers. Among other things, the bill gives class action defendants in all cases – federal and state – new mechanisms to delay and frustrate justice for victims by allowing a defendant or a class member, as a matter of right, an appeal of any lower court decision to certify a class action.[18] While this appeal is pending, a victim cannot conduct discovery or otherwise move a case forward. This will result in unwarranted, expensive and wasteful interruptions of meritorious cases. The legislation also includes provisions that would preempt private attorney general actions and mass tort cases by treating them as class action claims which are funneled into federal court.

Proponents of H.R. 1115 have attempted to deflect criticisms of the bill by incorporating a so-called "Consumer Class Action Bill of Rights,"[19] which, upon closer inspection, contains provisions that either do not improve current law or work to the detriment of consumers. These provisions would supposedly improve the law for consumers with respect to coupon settlements and settlement notices, but, in fact, simply codify a Rule of Civil Procedure already scheduled to be implemented; and prohibit certain awards to named plaintiffs, which would actually create a massive disincentive for civil rights class actions.

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state courts if they belong there while still attempting to solve the forum shopping and other issues addressed by the underlying bill; and Senator Spector's amendment, which strikes the language in the bill that would strip courts of jurisdiction over private attorney general actions brought by citizens or organizations and over mass tort cases.

In addition, the House version has other provisions that are not included in the Senate legislation. First, H.R. 1115 provides for an automatic right to appeal orders granting or denying class certification and states that during the appeal process, all discovery will be stayed. This is a drastic expansion of Rule 23(f) and could result in wasteful interruptions in the judicial process. Second, the House legislation requires that mass torts be removed to federal court, perhaps many miles from where the plaintiffs live. In addition, because mass torts that are not certified are not dismissed, these matter remain in limbo in the federal court system.

Finally, a Boucher/Smith amendment was added during the House Judiciary markup that broadens the application of the legislation to both civil cases commenced on or after the enactment date and to civil actions commenced before the enactment date but certified on or after the enactment date.

[18]H.R. 1115, § 6.

[19]H.R. 1115, § 3.

H.R. 1115 will damage both the federal and state courts. As a result of Congress' increasing propensity to federalize state crimes, the federal courts are already facing a dangerous workload crisis. By forcing resource intensive class actions into federal court, H.R. 1115 will further aggravate these problems and cause victims to wait in line for as much as three years or more to obtain a trial. Alternatively, to the extent class actions are remanded to state court, the legislation effectively permits only case-by-case adjudications, potentially draining away precious state court resources. In many instances, individual actions will not be economically feasible and hurt victims will be left with no remedy at all.

In our view, it is time for more corporate responsibility, not less. This bill gives corporate defendants – including defendants in corporate fraud and civil rights cases – a huge leg up in class action cases. If we have learned any lessons from the Enron, Firestone, Dalkon Shield and other product liability and financial debacles it is that our citizens need more legal protections against such wrongdoers, not less. Yet this bill takes us in precisely the opposite direction. For these and the other reasons set forth herein, we dissent from H.R. 1115.

I. H.R. 1115 Would Prejudice Pending Cases, Including Cases Against Notorious Corporate Criminals

This bill is the most extreme and far reaching class action reform bill ever considered by the House Judiciary Committee. Unlike predecessor versions of this bill, this legislation would apply to pending cases[20]–and thereby work to the benefit of corporate criminals and scam artists, like Enron, Worldcom, Adelphia and Tyco–by throwing pending lawsuits brought by defrauded investors out of state court. H.R. 1115 would disrupt these cases and add years of additional litigation. This means these defrauded victims will have to wait much longer to get their money back, while the corporate wrongdoers continue to enjoy the fruits of their ill-gotten gains.

This is a terrible precedent that will unfairly disadvantage plaintiffs in current class action lawsuits. It is especially troubling that the Committee took this course without first analyzing what and how many pending cases would be affected. It is quite possible that the retroactivity of this bill will cause tens of thousands of pending state cases to be moved to federal court all at once, creating a totally unworkable and unmanageable litigation crisis. Indeed, the bill would cause a needless waste of resources, as state judges – who may have overseen a case for years – would have the case yanked from their docket and instead placed before a federal judge, who would have to spend substantial time and resources acquainting himself or herself with the case.

Examples of pending cases impacted by this bill include the following:

- TRG Marketing sold fraudulent health insurance policies to more than 5,000 Floridians who were left with several million dollars in unpaid medical bills. According to the lawsuit, TRG was a scheme where premiums from new subscribers were used to pay the medical

[20] *See supra* note 17.

expenses of earlier subscribers. When enough subscriber dollars had been collected, the claims payments stopped and TRG took the money and ran. For Judy Harris, a named plaintiff, TRG abruptly stopped paying on claims for her cancer treatment in November 2001, leaving her family with $10,000 in unpaid medical bills. By using the class action system, the victims of TRG are banding together to hold TRG accountable for their fraud.[21]

- In April 2002, the bereaved families of victims of improper cremations filed a class action lawsuit to protect the interests of families similarly affected. For years, Tri-State Crematory (based in Georgia) had foregone cremations and instead, passed off wood chips, powdered cement and other substances as ashes to the grieving relatives. As of March 2003, there are at least 334 improperly handled bodies from the property. By preserving the interests of all of the families, the lawsuit gives families time to grieve and to decide what they want to do.[22]

- *Barnett* v. *Wal-Mart Stores, Inc.* is a pending lawsuit in King County Superior Court in Washington. It was filed in September 2001, on behalf of 40,000 present and former hourly employees at Wal-Mart stores in the state of Washington. Many make only $7.00 to $10.00 an hour. The lawsuit alleges and challenges Wal-Mart practices that have the effect of forcing employees to work without pay, or to work overtime at only their regular rates of pay, or to work through part or all of their rest and meal breaks, in violation of Washington statutory and contract law. Some claims go back to September 1998, and others go back to September 1995. The parties have taken the depositions of more than a hundred witnesses, and a great deal of other discovery has taken place. Plaintiffs have moved for class certification, the defendant has responded, and plaintiffs' reply is being held in abeyance while Wal-Mart produces computer files that will have to be analyzed. Almost all of the work to date has focused on meeting the standards for class certification under Washington law, and the parties are operating under scheduling orders issued by the Washington court.

II. Federalizing Class Actions Will Harm Consumers and Damage the Court Systems

A. H.R. 1115 Will Weaken Enforcement of Laws Concerning Consumer Health and Safety, the Environment and Civil Rights

H.R. 1115 will have a serious adverse impact on the ability of consumers and other harmed individuals to obtain compensation in cases involving widespread harm. At a minimum, the legislation will force most state class action claims into federal courts where there will be far more victims to litigate cases and where defendants could force plaintiffs to travel long distances to attend proceedings.

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[21] *Lavovere, et al. v. TRG*, CA02-14542A1 (Fla.)

[22] *Oden, et al. v. Taylor Funeral Home*, No. 02C-414 (Walker County, Ga)

It also will be far more difficult and time consuming to certify a class action in federal court. In 1999, fourteen states, representing approximately 29% of the nation's population, adopted different criteria for class action rules than Rule 23 of the Federal Rules of Civil Procedure.[23] In addition, with respect to those states that have enacted a counterpart to Rule 23, the federal courts are likely to represent a far more difficult forum for class certification to occur. This is because in recent years a series of adverse federal precedent has made it more difficult to establish the predominance requirement of Rule 23(b)(3) to establish a class action under the federal rules.[24] The defense bar has as much as admitted this. To quote from a recent article written by two corporate class action attorneys: "As a general rule, defendants are better off in federal court . . . there is generally a greater body of federal precedent favorable to defendants."[25]

Further, the legislation will inevitably result in substantial delay before civil class action claimants are able to obtain a trial date in federal court. Given the backlog in the federal courts and the fact that the federal courts are obligated to resolve criminal matters on an expedited basis before civil matters,[26] even when plaintiffs are able to successfully certify a class action in federal court, it will take longer to obtain a trial on the merits than it would in state court.

The legislation also creates unique risks and obstacles for plaintiffs that they do not face under current law. Because the federal courts are required to dismiss cases they choose not to

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[23]*See* Conference of Chief Justices letter, *supra* note 2.

[24]Federal courts have been narrowly construing Rule 23, thereby limiting the parties' ability to bring and certify class actions in federal courts. For example, in *Castano v. American Tobacco Co*., 84 F.3d 734 (5th Cir. 1996), the Fifth Circuit prevented the certification of a nationwide class action brought by cigarette smokers and their families for nicotine addiction because it found there to be too wide a disparity between the various state tort and fraud laws for the class action vehicle to be superior to individual case adjudication. Similarly, in *In re Rhone-Poulenc Rorer, Inc*., 51 F.3d 1293 (7th Cir. 1995), *cert denied*, 516 U.S. 867 (1995), the Seventh Circuit held that where claims were immature, it is preferable that they be individually adjudicated. Also, in *Georgine v. Amchem Products, Inc*., 521 U.S. 591 (1997), the Supreme Court overturned a consensual settlement between a class of workers injured by asbestos and a coalition of former asbestos manufacturers because uncommon issues, particularly the disparate levels of the class members' knowledge of their injuries, as well as each class member's relatively large amount at stake in the litigation, meant that class treatment was not superior to individual treatment of the plaintiffs' claims. Additionally, on June 23, 1999, in *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), the Supreme Court again invalidated an asbestos settlement agreement on the grounds that mandatory limited fund class treatment under Rule 23(b)(1)(B) is not appropriate unless the maximum funds available are clearly inadequate to pay all claims.

[25]Reid and Coutroulis, "Checkmate in Class Actions: Defensive Strategy in the Initial Moves," *Litigation* (Winter 2002).

[26]Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1994).

certify, plaintiffs will be foreclosed from forming a reconstituted class in state court that would conform to the legislation's requirements.[27] While the class action may be refiled again, any such refiled action may be removed again to federal court. Therefore, even if a state court would subsequently certify the class, it could be removed again, creating a revolving door between federal and state court – hardly a desirable result.[28]

As Consumers Union has stated about this feature of the bill, "This legal 'ping-pong' could well deprive consumers of access to their own state courts, and ultimately deny them their day in court through the class action process- in many cases their only effective remedy."[29] Moreover, even if the federal court certifies the class, plaintiffs still face further delays because of the mandatory interlocutory appeal provision.[30]

The harm to civil rights cases, which are heavily reliant on class actions for access to justice, would be particularly problematic. As the Lawyers Committee for Civil Rights under the Law observed, "[t]he consequences of the [legislation] for class action practice in the federal courts would be astounding and, in our view, disastrous. Redirecting state law class actions to the federal courts will choke federal court dockets and delay or foreclose the timely and effective determination of federal cases already properly before the federal courts, in addition to the newly directed cases."[31]

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[27]For example, if certification had been denied by the federal court because a particular conflict among the class members made it impossible to meet the "adequate representation" requirement of Federal Rule of Civil Procedure 23(a)(4), the plaintiffs would likely be prohibited from narrowing the class in an effort to resolve that conflict.

[28]In this regard, it is unfortunate the Majority rejected an amendment offered by Representative Scott that largely would have eliminated the federalism problem. Mr. Scott's amendment would have allowed the federal courts the first opportunity to certify a class action, but if the federal court determined that the action did not meet federal requirements, the state court from which it was removed would not have been denied jurisdiction over the class action. This would have responded to the most serious complaint leveled by corporate defendants--that class actions encourage a race to the court house--by permitting the federal courts to use their powers to consolidate class actions into a single forum in the appropriate circumstances.

[29]*See* Letter from Sally J. Greenberg, Senior Product Safety Counsel, Consumers Union (March 5, 2002) (on file with the minority staff of the House Judiciary Committee).

[30]*See supra* note 18.

[31] *Class Action Fairness Act of 2003*: *Hearings on H.R. 1115 before the House Comm. on the Judiciary*, 108th Cong.(2003) [hereinafter "Henderson Testimony"] (written testimony of Thomas Henderson, Chief Counsel, Lawyers' Committee for Civil Rights Under Law).

Moreover, as the Lawyers Committee noted, the principal motivation by the American Tort Reform Association in advocating this legislation would appear to be to remove the cases from jury pools that are composed largely of minorities and those with low incomes. Their report entitled "Bringing Justice to Judicial Hellholes 2002" identifies thirteen counties/jurisdictions that it describes as "hellholes," where it claims the rules are not applied fairly to defendants. Although no criteria is put forth to distinguish which jurisdictions may meet the "hellhole" threshold, almost all of the jurisdictions have populations in which people of color constitute majorities or near-majorities, and others have populations with disproportionately low incomes.[32]

In addition, the legislation includes provisions that allow any plaintiff in a class action case to seek to remove to federal court, and that extend the time period for removal beyond that currently permitted. This means that any single party out of tens of thousands – conceivably even an employee of a defendant – could unilaterally seek to remove a case, throwing out thousands of hours or more of work that may have been spent pursuing a state claim. This again has the effect of making most efforts to obtain justice in state court simply too risky to pursue.

Consumers will also be disadvantaged by the vague terms used in the legislation. The terms "substantial majority" of plaintiffs, "primary defendants," and claims "primarily" governed by a state's laws[33] are new and undefined phrases with no precedent in the United States Code or the case law. It will take many years and conflicting decisions before these critical terms are sorted out. The vagueness problems will be particularly acute for plaintiffs—if they guess incorrectly regarding the meaning of a particular phrase, their class action could be permanently preempted and barred. However, if defendants guess wrong and jurisdiction does not lie in the federal courts, the defendants will be no worse off than they are under present law, but rather will have benefitted from the additional time delays caused by the failed removal motion.

The net result of these various changes is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the state or federal level. This means, as noted above, it will be far more difficult for consumers to bring class actions in state court involving violations of fraud, health and safety, and environmental laws.

The following are examples of important class actions previously brought at the state level, but which could be forced into federal court under H.R. 1115, where the actions would be delayed or rejected:

- In the Baptist Foundation of Arizona case, a mirror image of the Enron scandal, the Foundation issued worthless notes and sold them in many Arizona communities. Approximately 1,300 investors lost millions of dollars in this scheme in "off the books"

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[32]Lawyers' Committee for Civil Rights Under Law, *The Impact of the "Class Action Fairness Act" on Civil Rights Cases (2003).*

[33]H.R. 1115, § 4.

transactions with sham companies that were controlled by the Foundation and corporate insiders. The victims were able to bring a successful state class action suit against Arthur Anderson, which resulted in a $217 million settlement. If H.R. 1115 was law, this case would have been forced into federal court because the legislation provides no exemption for state securities claims.[34]

- The proposed legislation would also make it far more difficult to maintain class action cases such as the Firestone/Ford Explorer tire liability case. A lawsuit was brought in South Carolina state court against Firestone and Ford charging that the two companies were "negligent and careless" in producing and distributing tires that went on Ford vehicles. On December 28, 2001, the Circuit Court in Greenville, South Carolina certified the lawsuit as a class action, allowing South Carolina residents to join the lawsuit against Firestone and Ford. If the proposed legislation was enacted, this case could have automatically been removed from state court to federal court at the election of the defendant and would make it difficult to keep the lawsuit as a class action.

- Foodmaker Inc., a Delaware corporation and the parent company of Jack-in-the-Box restaurants, agreed to pay $14 million in a state class action settlement involving a violation of Washington's negligence law. The class included 500 people, mostly children and Washington residents, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli 0157:H7 bacteria. The victims suffered from a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died.[35]

- Equitable Life Assurance Company, an Iowa corporation, agreed to a $20 million settlement of two class-action lawsuits involving 130,000 people filed in Pennsylvania and Arizona state courts. The class action alleged that Equitable misled consumers, in violation of state insurance fraud law, when trying to sell "vanishing premium" life insurance policies in the 1980s. Equitable sold the policies when interest rates were high, informing potential customers that after a few years, once the interest generated by their premiums was sufficiently high, their premium obligations would be terminated. However, when interest rates dropped, customers were still required to pay the premium in full.[36]

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[34]Craig Harris, *Andersen settles Baptist Suit,* azcentral.com (March 2, 2002), http://www.arizonarepublic.com; *Settlement Sum Revives Hope for Baptist Investors: Andersen to pay $217 million* (March 3, 2002), http://www.arizonarepublic.com.

[35] The settlement was approved on 25 September 1996 in King County, Washington Superior Court. "Last Jack in the Box Suit Settled," *Seattle Times*, October 30, 1997 at B3.

[36]*See* David Elbert, "Lawsuits to Cost Equitable $20 Mill," *Des Moines Register*, July 19, 1997 at 12; "Cost of Settling Lawsuits Pulls Equitable Earnings Down," *Des Moines Register,* August 6, 1997 at 10.

- On July 26, 1993, a California plant operated by General Chemical, a Delaware corporation with offices in New Jersey, erupted, leading to a hazardous pollution cloud when a valve malfunctioned during the unloading of a railroad tank car filled with Oleum, a sulfuric acid compound. The cloud settled directly over North Richmond, California, a heavily-populated community, resulting in over 24,000 residents needing medical attention. General Chemical entered into a settlement for violation of California negligence law with 60,000 North Richmond residents who were injured or sought treatment for the effects of the cloud, or were forced to evacuate their homes. Individual plaintiffs received up to $3,500 in compensation.[37]

- On April 21, 1999, Nationwide entered into a state class action settlement concerning a redlining discrimination claim with the Toledo, Ohio Fair Housing Center. The lawsuit had been brought in Ohio state court by residents living in Toledo's predominately black neighborhoods, and charged that Nationwide redlined African-American neighborhoods by discouraging homeowners in minority neighborhoods from buying insurance and by denying coverage to houses under a certain value or a certain age. As a result of the settlement, Nationwide agreed to modify its underwriting criteria, increase its agency presence, and step up its marketing in Toledo's black neighborhoods. Nationwide also agreed to place up to $2 million in an interest-bearing account to provide compensation to qualified class members, and agreed to deposit $500,000 with a bank willing to offer low-interest loans to residents buying homes in Toledo's black neighborhoods.[38]

- Under current law, class action claims against managed care must often distinguish between ERISA and non-ERISA patients. Non-ERISA patients have a full range of remedies available to them under state law. However, ERISA patients have a very limited set of remedies—the cost of the benefit denied, which in most cases is woefully inadequate. The managed care reform debate in Congress includes the elimination of the ERISA preemption, which would allow patients who receive their health care from their employer to hold their HMO accountable if it denies care. However, legislation such as H.R. 1115 moves in the opposite direction by denying more patients access to justice in state court.[39]

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[37]*See* Mealey's Litigation Reports: *Toxic Torts, $180 Million Settlement of Toxic Cloud Claims Wins Judges O.K.,* November 17, 1995 at 8.

[38]*See Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, No CI93-1685, Ohio Comm. Pls, Lucas County; *see also* "Nationwide and Ohio Fairhousing Announce Attempt to Settle Class Action," *Mealey's Insurance Law Weekly*, April 27, 1998 at 3.

[39]One example is *Kaitlin v. Tremoglie, et al.*, No. 002703 (Pa. Comm. Pls., Philadelphia Co. 1997). On June 23, 1997, Harold Kaitlin filed a class action in Pennsylvania State court against his psychiatrist, David Tremoglie, and Keystone Health Plan East Inc., his HMO, alleging that the psychiatrist had treated hundreds of patients without a medical license. The case was filed on behalf of himself and all other patients treated by Tremoglie at the Bustleton Guidance Center.

- The regulation of funeral homes, cemeteries and crematoria should remain an issue best handled by state courts. However, federalizing such class actions under this bill likely would force harmed families to travel untold miles from their homes – in some cases into entirely different states – just to exercise their legal rights. For example, the largest operator of funeral homes in the United States is the defendant in a state class action in West Palm Beach, Florida. The action accuses Services Corporation International, a Texas Corporation and owner of Menorah Gardens, of breaking open burial vaults and dumping the remains in a wooded area, crushing vaults to make room for others, mixing body parts from different individuals, and digging up and reburying remains in locations other than the plots purchased.[40] As noted above, the Tri-State Crematory failed to cremate bodies and return remains to loved ones. Although the issues raised in these class actions are clearly state issues, they would be removable to federal court under H.R. 1115.

B. H.R. 1115 Will Damage the Federal and State Court Systems

Impact on Federal Courts

Expanding federal class action jurisdiction to include most state class actions, as H.R. 1115 does, will inevitably result in a significant increase in the federal courts' workload. As the Judicial Conference has recently noted: "the provisions would add substantially to the workload of the federal courts and are inconsistent with federalism."[41] Similarly, in previous Congresses, the Judicial Conference stated that they see no "hard evidence of the inability of state judicial systems to hear and decide fairly class actions brought in state courts."[42]

The workload problem in the federal courts continues to be severely problematic. For example, in 2003, the situation of the federal courts was as follows:

- As of May 28, 2003, 45 judicial vacancies existed, or over 5% of the federal judicial

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The suit alleges that the class was treated by an unlicenced and fraudulent psychiatrist who unlawfully prescribed powerful medications not suitable for their illness and that the HMO failed to verify that Tremoglie was a licensed psychiatrist, failed to supervise him, and referred patients to him.

[40] Joel Engelhardt, *State Seeks Control of Menorah Gardens*, The Palm Beach Post, March 2, 2002 at 1A.

[41] Mecham letter, p.2.

[42] Conference of Chief Justices letter, *supra* note 2.

positions.[43]

- On average, federal district court judges had 494 civil filings pending last year.[44]

Because of these and other workload problems, Chief Justice Rehnquist took the important step of criticizing Congress for taking actions that have exacerbated the courts' workload problem:

> I also criticized Congress and the president for their propensity to enact more and more legislation which brings more and more cases into the federal court system. This criticism received virtually no public attention. . . .[I]f Congress enacts, and the president signs, new laws allowing more cases to be brought into the federal courts, just filling the vacancies will not be enough. We will need additional judgeships.[45]

H.R. 1115 would result in the removal of most state court class actions into federal court. The federal courts have fewer than 1,500 judges compared to more than 30,000 judges currently serving on state courts. The number of federal civil cases pending for three years or more has *doubled* since 1999 to more than 34,000. While nobody knows the precise number, there are thousands of class action lawsuits pending in state courts around the country that would be added, even if temporarily, to the federal docket under H.R. 1115.

Class actions are among the most complex and time-consuming cases that courts must decide. In fact, studies have shown that class actions on average consume almost five times more judicial time than the typical civil case. Adding thousands of resource-intensive state cases to the federal courts would place additional stresses and demands on an already overburdened system. Compounding the federalism problem, these new federal cases will involve issues of primarily state law, with which state court judges are familiar and federal judges are not.

This would result in federal judges having less time to devote to the additional class actions, as well as to their existing caseloads. Class action lawsuits and settlements would receive even *less* careful judicial supervision than they receive today, potentially leading to court approval of even *more* collusive settlements, not fewer. In addition, growing caseloads will delay justice in class actions as well as in other federal court cases. Finally, overburdened judges may be more likely to dismiss class action claims in order to clear their dockets, even in meritorious cases.

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[43]*See generally* Judicial Nominations, Department of Justice, Office of Legal Policy, *available at* http://www.usdoj.gov/olp/judicialnominations.htm (last viewed May 28, 2003).

[44]*See* Admin. Office of the U.S. Courts, Judicial Caseload Indicators, *available at* http://www.uscourts.gov/caseload2002/front/mar02txt.pdf (2002).

[45]Chief Justice William Rehnquist, An Address to the American Law Institute, *Rehnquist: Is Federalism Dead?* (May 11, 1998), in *Legal Times* (May 18, 1998). Rehnquist recently reiterated those concerns. 2002 Year End Report on the Federal Judiciary, *available at* http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html (2003).

Impact on State Courts

In addition to its impact on the federal courts, the legislation will also undermine state courts. This is because in cases where the federal court chooses not to certify the state class action, the bill prohibits the states from using class actions to resolve the underlying state causes of action. It is important to recall the context in which this legislation arises—a class action has been filed in state court involving numerous state law claims, each of which if filed separately would not be subject to federal jurisdiction (either because the parties are not considered to be diverse or the amount in controversy for each claim does not exceed $2,000,000). When these individual cases are returned to the state courts upon remand, hundreds if not thousands of potential new cases may be unleashed.[46]

In addition to these workload problems, the legislation raises constitutional issues. H.R. 1115 does not merely operate to preempt an area of state law, it also unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes. As the Conference of Chief Justices stated, the legislation in essence "unilaterally transfer[s] jurisdiction of a significant category of cases from state to federal courts" and is a "drastic" distortion and
disruption of traditional notions of judicial federalism.[47]

In this regard, the courts have previously found that efforts by Congress to dictate state court procedures implicate important Tenth Amendment federalism issues and should be avoided. For example, in *Fielder v. Casey*[48] the Supreme Court observed that it is an "unassailable proposition .... that States may establish the rules of procedure governing litigation in their own courts." Similarly in *Johnson v. Fankell*[49] the Court reiterated what it termed "the general rule 'bottomed deeply in belief in the importance of State control of State judicial procedure . . . that Federal law takes State courts as it finds them'"[50] and observed that judicial respect for the

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[46]To counter this problem, Congressman Scott offered an amendment at the Judiciary Committee markup that provided for remand of the action to state court without prejudice if, after removal, the Federal court determines that no aspect of an action that is subject to its jurisdiction may be maintained as a federal class action. By allowing the federal court the first opportunity to certify the class action but not denying the state court jurisdiction over the action once the federal court determines that the action does not meet federal requirements, this amendment addresses a serious complaint leveled by class action defendants. The amendment was defeated by a voice vote.

[47]*See supra* note 2.

[48]487 U.S. 131, 138 (1988).

[49]520 U.S. 911 (1997).

[50]*Id*. at 919 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).

principal of federalism "is at its apex when we confront a claim that Federal law requires a State to undertake something as fundamental as restructuring the operation of its courts" and "it is a matter for each State to decide how to structure its judicial system."[51]

The Supreme Court's most recent decisions further indicate that H.R. 1115 is an unacceptable infringement upon state sovereignty. In *United States* v. *Morrison*[52], the court invalidated parts of the Violence Against Women Act, claiming that Congress overstepped its specific constitutional power to regulate interstate commerce. Despite vast quantities of data illustrating the effects that violence against women has on interstate commerce, the Court essentially warned Congress not to extend its constitutional authority to "completely obliterate the Constitution's distinction between national and local authority."[53] H.R. 1115 ignores the Court's admonition and subverts the federal system by hindering the states' ability to adjudicate class actions involving important and evolving questions of state law.

These same constitutional concerns were highlighted by Professor Laurence Tribe in his testimony during the 105th Congress regarding the constitutionality of certain aspects of tobacco legislation, including a proposed federal class action rule applicable to state courts. He observed, "[f]or Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims -- to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits -- would raise serious questions under the Tenth Amendment and principles of federalism."[54]

Arguments that the bill is nonetheless justified because state courts are "biased" against out-of-state defendants in class action suits also lack foundation.[55] First, the Supreme Court has already made clear that state courts are constitutionally required to provide due process and other

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[51]*Id.* at 922. *See also Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 508 (1954) (for the proposition that federal law should not alter the operation of the state courts); *New York v. United States,* 505 U.S. 144, 161 (1992) (stating that a law may be struck down on federalism grounds if it "commandeer[s] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program"); *Printz v. United States*, 117 S.Ct. 2365 (1997) (invalidating portions of the Brady Handgun Violence Protection Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

[52]529 U.S. 598 (2000).

[53]*Id.*

[54]*The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School).

[55]Of course the entire premise of the argument would need to be based on bias by the judges, since the juries would be derived from citizens of the state where the suit is brought, whether the case is considered in state or federal court.

fairness protections to the parties in class action cases. In *Phillips Petroleum Co. v. Shutts*,[56] the Supreme Court held that in class action cases, state courts must assure that: (1) the defendant receives notice plus an opportunity to be heard and participate in the litigation;[57] (2) an absent plaintiff must be provided with an opportunity to remove himself or herself from the class; (3) the named plaintiff must at all times adequately represent the interests of the absent class members; and (4) the forum state must have a significant relationship to the claims asserted by each member of the plaintiff class.[58]

Second, as fears of local court prejudice have subsided and concerns about diverting federal courts from their core responsibilities have increased, the policy trend in recent years has been towards *limiting* federal diversity jurisdiction.[59] For example, several years ago Congress enacted the Federal Courts Improvement Act of 1996,[60] which *increased* the amount in controversy requirement needed to remove a diversity case to federal court from $50,000 to $75,000. This statutory change was based on the Judicial Conference's determination that fear of

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[56]472 U.S. 797 (1985).

[57]The notice must be the "best practicable, reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)).

[58]*See id.* at 806-10. These findings were reiterated by the Supreme Court in 1995 in *Matshusita Elec. Indust. Co. v Epstein*, 516 U.S. 367 (1995) (state class actions entitled to full faith and credit so long as, *inter alia*, the settlement was fair, reasonable, and adequate and in the best interests of the settlement class; notice to the class was in full compliance with due process; and the class representatives fairly and adequately represented class interests).

[59]Ironically, during the 105th Congress, the Republican Party was extolling the virtues of state courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional state law convictions in federal court. At that time Chairman Hyde stated:

> I simply say the state judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest ... when the judge raises his hand, State court or Federal court, they swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, *ipso facto*, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

142 Cong. Rec. H3604. (daily ed. April 18, 1996).

[60]28 U.S.C. § 1332(a) (West Supp. 1998).

local prejudice by state courts was no longer relevant[61] and that it was important to keep the federal judiciary's efforts focused on federal issues.[62] In this same regard, the American Law Institute has found "there is no longer the kind of prejudice against citizens of other states that motivated the creation of diversity jurisdiction."[63] And finally, the most recent Federal Courts Study Committee report on the subject concluded that local bias "is no longer a major threat to litigation fairness" particularly when compared to other types of prejudice that litigants may face, such as on account of religion, race or economic status.[64] Indeed, in 1978, the House twice passed legislation that would have abolished general diversity jurisdiction.[65]

Third, as the legislation is currently written, it assumes a defendant will be automatically subject to prejudice in any state where the corporation is not formally incorporated (typically Delaware) or maintains its principal place of business. In so doing, the bill ignores the fact that many large businesses have a substantial commercial presence in more than one state, through factories, business facilities or employees. For example, if General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees, it does not seem reasonable to expect the defendants to face any great risk of bias.[66] Similarly, if the Disney Corporation, one of Florida's largest employers, were to face a class

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[61]The Judicial Conference of the United States, Long Range Plan for the Federal Courts, Recommendation 7 at 30 (1995).

[62]*Id.*

[63]American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 101, 106 (1996).

[64]Federal Courts Study Committee, Report of the Federal Courts Study Committee 40 (April 2, 1990). *See also*, Ball, *Revision of Federal Diversity Jurisdiction*, 28 Ill. L. Rev. 356 (1988); Bork, *Dealing with the Overload in Article III Courts,* 1976, 70 F.R.D. 231, 236-237 (1976); Butler & Eure, *Diversity in the Court System: Let's Abolish It*, 11 Va.B.J. 4, (1995); Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 Brookings Rev. 34 (1992); Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 1-49 (1968); Feinberg, *Is Diversity Jurisdiction An Idea Whose Time Has Passed?*, N. Y. St. B. J. 14 (1989); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Corn. L. Q. 499 (1928); Frankfurter, *A Note on Diversity Jurisdiction – In Reply to Professor Yntema*, 79 U. Pa. L. Rev. 1097 (1931); Haynsworth, Book Review, 87 Harv. L. Rev. 1082, 1089-1091 (1974); Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. Rev. 347 (1978); Jackson, *The Supreme Court in the American System of Government*, 38 (1955); Sheran & Isaacman, *State Cases Belong In State Courts*, 12 Creighton L. Rev. 1 (1978).

[65]*See* 124 Cong. Rec. 5008 (1978); 124 Cong. Rec. 33, 546 (1978). The legislation was not considered in the Senate.

[66]General Motors and Ford both have their principal place of business in Michigan and are incorporated in Delaware.

action in a Florida court, it would make little sense to involve the federal courts out of concern for local prejudice.[67] Yet under H.R. 1115, both of these hypothetical cases would be subject to removal to federal court.[68]

III. The Legislation Includes Numerous Pro-defendant Provisions That Have Nothing to Do with Class Action Jurisdiction

In addition to federalizing state class actions on a retroactive basis, the legislation also includes a series of unrelated "give aways" that will harm injured victims and have nothing to do with the bill's purported subject matter – class action jurisdiction.

A. Interlocutory Appeals

Section 6 of H.R. 1115 provides defendants with a significant mechanism to delay and frustrate an injured plaintiff's pursuit of justice. The section provides a party the right, in every case, to an interlocutory appeal of a court's decision granting or denying class certification, if an appeal notice is filed within 10 days, and stays discovery while such an appeal is pending.

This is a marked departure from Federal Rule of Civil Procedure 23(f), adopted in 1998, which provides courts of appeals discretion to grant an interlocutory appeal of a class action certification and discretion to stay discovery. In describing the rationale for adopting a discretionary standard as opposed to granting such an appeal as a matter of right, Circuit Court Judge Anthony J. Scirica, Chairman of the Committee on Rules and Practice of the Judicial Conference has noted the following:

> [Rule 23(f)] addressed concerns expressed by many judges and lawyers that interlocutory appeals are often unnecessary and would be abused as a procedural tactic to delay proceedings and unfairly increase litigation expense in many class actions. . . . Interlocutory appeals in general have been traditionally disfavored because they can cause unwarranted, expensive and wasteful interruptions ... Providing an appeal as of right [as

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[67]Disney's corporate headquarters are located in Burbank, California, and it is incorporated in Delaware.

[68]With increasing frequency, companies are setting up paper companies in places like Bermuda for a nominal fee. The company continues to be owned by the U.S. shareholder and continues to do business in the exact same U.S. locations. This allows the company to escape substantial tax liability and possibly avoid legal liability. To stop this abuse, Representatives Conyers and Jackson-Lee offered an amendment at the Judiciary Committee markup which would allow former U.S. companies to be treated as domestic corporations for class action purposes. This amendment was defeated by a vote of 20-13.

H.R. 1115 does] might tempt a party to file an interlocutory appeal solely for tactical reasons.[69]

Section 6 is completely unnecessary because courts already possess the power to review significant or controversial class certification decisions and to stay lower court proceedings. The courts' discretion is important because many class certification decisions are clear and non-controversial. As the Supreme Court noted in *Amchem Products Inc. et. al. v. Windsor et. al*, some key aspects of class certification are "readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." An interlocutory appeal of class certification decisions in those cases would only add unnecessary delay and cost to already complex lawsuits.[70]

In fact, Courts of Appeals accept Rule 23(f) appeals frequently. Since its inception, Rule 23(f) appeals have been accepted about 80 percent of the time they are requested. In that time, a circuit court has never reversed a district court's decision to deny class certification. There has been no showing that the federal appeals courts have not granted review in enough cases, or that this rule has been unfairly applied to defendants.

If H.R. 1115 is enacted, it will retroactively affect pending cases that have not reached class certification and the innocent victims will have to wait *at least* another year to get their money back. And, if the defendants lose on appeal, they can seek certiorari to the Supreme Court, which rarely succeeds, but would tack an additional six to nine months on the delay for the harmed victims. Enron shareholders have already endured a discovery delay of approximately 1 ½ years because of special rules that apply to securities lawsuits. In fact, it was during this delay that the accounting firm Arthur Andersen was caught destroying documents. H.R. 1115 would permit corporate wrongdoers like those in Enron, Worldcom, Tyco, Adelphia, etc. to delay justice for their victims even further.

B. Private Attorney General and Mass Tort Cases

H.R. 1115 federalizes more than class actions: Under proposed 28 U.S.C. § 1332(d)(9), this bill would also create federal jurisdiction for two additional categories of cases: (1) private attorney general actions brought by any organization or citizen; and (2) groups of cases in which 100 or more individuals seeking monetary relief seek to try *any* common legal or factual issue together.

Section 4(a)'s proposed new section 1332(d)(9)(A) would define private attorney general actions as class actions and allow them to be removed to federal court if filed in state court. The provision is obviously aimed at actions under section 17200 of the California Business and Professions Code, which has proved an important tool for victims of unfair and deceptive business

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[69] Scirica letter, p.2.

[70] 521 U.S. 591 (1997)

practices. In section 17200, the California Legislature has decided to provide legal standing for organizations and individuals to act as private attorneys general; broader than the standing generally allowed in the federal courts.

The California Legislature has decided to allow private parties to combat corporate fraud and other malfeasance on the theory that the California Attorney General simply does not have the resources to do it all. That policy choice, in our system of federalism, should be California's prerogative. H.R. 1115 would override that state policy choice and transfer California private attorney general actions to federal court, where they would be automatically deemed class actions and be subjected to federal Rule 23 certification criteria and federal standing requirements. This is why the California League for Environmental Enforcement Now is so strongly opposed to the private attorney general provision, writing, "the Act targets the ability of local residents to bring environmental, public health, civil rights, and consumer actions on behalf of the public in state court. We are calling on you to defeat this legislation that threatens the ability of citizens to protect state environmental, civil rights, and consumer protection laws."[71]

To make matters worse, H.R. 1115's minor exclusions for federal jurisdiction – for instance, where the aggregate value of the claims is $2 million or less, or where the number of affected people is fewer than 100 – do not apply to its private attorney general action provision. In a state as large and transient as California, any private attorney general action seeking compensation for all victims of a corporation's instate misconduct will involve some significant number of out-of-state victims, virtually all 17200 actions seeking monetary relief will be removable to federal court.[72]

H.R. 1115's federalization of individual joinder actions (e.g. mass tort cases) is equally problematic. Section 4(a)'s proposed new U.S.C. § 1332(d)(9)(B) would define damages suits filed in state court by individual plaintiffs as class actions if, at any time, 100 or more plaintiffs sought to try any common legal or factual issue.

Under current law dating back to the creation of the federal courts, these individual actions could only be tried in state court. But under H.R. 1115, some of these cases could be deemed "individual joinder actions" and could be removed to federal court, away from the trial and appellate courts with expertise in applicable state law, perhaps many miles from the town in

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[71]Letter from Michael Schmitz, Executive Director of California League for Environmental Enforcement Now (CLEEN) (April 24, 2003) (on file with the minority staff of the House Judiciary Committee).

California is not the only state that would be affected by this provision. In Michigan, for instance, the Michigan Consumer Protection Act (MCPA) gives private citizens the right to seek damages for certain false, misleading, and deceptive business practices as a "private attorney general." Mich. Comp. Laws §445.911 (1976).

[72]*See* proposed 28 U.S.C. § 1332(d)(9) (last sentence).

which the injuries arose, and, if an appeal were ever filed, to a federal court of appeals.

Moreover, once the case is in federal court, the plaintiffs must meet the certification requirements of Federal Rule of Civil Procedure 23. However, unlike the bill's treatment of genuine class actions, these individual state law cases are not dismissed without prejudice to re-filing in state court if Rule 23's requirements are not met; rather, they remain in limbo in federal court. This would require the federal court to adjudicate dozens or even hundreds of garden-variety state tort claims on an individual basis – claims valued at far less than the $75,000 jurisdictional amount set by Congress for federal court diversity cases under 28 U.S.C. § 1332(a).

IV. The So-Called "Consumer Bill of Rights" is Largely Meaningless or Counterproductive

Finally, we would note that the much touted "Consumer Bill of Rights" includes precious few provisions that will actually benefit injured consumers. Instead, most of these provisions are either redundant of current law and practice, or will actually make it more difficult for victims to obtain justice.

The most highly touted portion of H.R. 1115 is Section 1711, which purports to address inequities in coupon settlements.[73] Proponents of the bill assert that there is widespread misuse of these settlements, allowing plaintiff's attorneys to recoup large fees while class members are left with nothing more than a coupon for the defendant's product. It should be noted at the outset that coupon settlements are traditionally favored by defendants.[74] More importantly, section 1711 does *nothing* to address the problem. Under the legislation, a coupon settlement may be approved only after a court finds that the settlement is "fair, reasonable, and adequate" for class members.[75] This is identical to the universal settlement approval standard applicable to all cases, which requires a court to issue a written finding that a settlement is "fair, adequate, and reasonable."[76] Thus, in the area of coupon settlements–the area most cited by proponents to justify this legislation–the bill does nothing to alter or improve current law.

Nor does H.R. 1115's provision for "notice requirements" to class members improve current law. In fact, H.R. 1115 originally contained a long, detailed notice provision that would actually confuse consumers–not help them. According to the Judicial Conference Rules Committee, H.R. 1115's notice requirements would have "undermine[d] the bill's stated

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[73]H.R. 1115, § 3, proposed 28 U.S.C §1711.

[74]Wolfman, pps. 18-19 ("[D]efendants love coupon settlements in which the coupon will have little or no value. The settlement provides a modest marketing gimmick for the defendants' products, while ridding the defendants of potentially troublesome litigation for little more than the cost of attorneys fees.").

[75]H.R. 1115, § 3, proposed 28 U.S.C §1711.

[76]Wolfman p. 19.

objectives by requiring notices so elaborate that most class members [would] not even attempt to read them."[77] Fortunately, the Committee accepted an amendment conforming the notice requirements to the Federal Rules of Civil Procedure, neutralizing yet another harmful provision of the bill. But again, the final net result is to simply codify current practice.

Section 1714 also contains a provision prohibiting "the payment of bounties," which is harmful to civil rights cases. In an employment discrimination case, there may be fewer employment slots denied than there are qualified applicants.[78] A plaintiff filing an individual action may obtain an order placing him or her in the job denied and receive back pay.[79] Such a remedy would, of course, be appropriate under current law for a named plaintiff in a class action. However, H.R. 1115 would bar such a remedy for named plaintiffs unless each and every other class member also receives the same. This may well be an impossibility and will certainly act as a deterrent to civil rights class actions in general, and becoming a class representative in particular.

Thomas Henderson, Chief Counsel of the Lawyers Committee for Civil Rights, has testified as to the damage this bounty provision would do to civil rights cases:

> The prohibition on approving settlements that involve named plaintiffs receiving amounts different from other members of the class is not a reasonable or practical limitation in all instances. In many employment discrimination cases there are fewer employment opportunities denied because of discrimination than there are qualified potential claimants. In those situations, a person who sues as an individual can receive a full award of back pay and in a proper case can obtain an order placing him or her in the job denied because of discrimination. A class member in such a situation must share in the total back pay award, and has only an opportunity to be one of the persons selected for hire or promotion because not all can be selected. If the price of trying to protect others is that he or she must also lose the full measure of individual relief and take only the same percentage share as those who never took any action to challenge the employer, individuals would be deterred from becoming a class representative. Thus, rather than a reform, this provision would hinder civil rights class actions.[80]

Conclusion

H.R. 1115 will remove class actions involving state law issues from state courts – the forum most convenient for victims of wrongdoing and with judges most familiar with the substantive law involved – to the federal courts, where the class is less likely to be certified and the case will take longer to resolve. In our view, this incursion into state court prerogatives is no

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[77]Scirica letter, p. 3.

[78]Henderson Testimony.

[79]*Id.*

[80]*Id.*

less dangerous to the public than many of the radical forms of "tort reform" and "court stripping" legislation previously rejected by the Congress.

Contrary to supporters' assertions, H.R. 1115 will not prevent state courts from unfairly certifying class actions without granting defendants an opportunity to respond. This is already barred by the Constitution, and the few state trial court decisions to the contrary have been overturned.[81] H.R. 1115 also cannot be seen as merely prohibiting nationwide class actions filed in state court. The legislation goes much further and bars state class actions filed solely on behalf of residents of a single state and that solely involve matters of that state's law, so long as one plaintiff resides in a different state than one defendant–an extreme and distorted definition of diversity that does not apply in any other legal proceeding.

In addition, we are deeply troubled by provisions in the legislation that would apply the new rules to cases that have already been filed, and to provisions that will give corporate wrongdoers massive new abilities to delay meritorious class actions from proceeding. Also, we object to provisions in the bill that treat non-class action cases as class actions and subject them to these harsh, anti-victim rules, and to provisions in the so-called "Consumer Bill of Rights" that would limit the ability of civil rights victims to take the lead in seeking relief.

This legislation would seriously undermine the delicate balance between our federal and state courts. It would threaten to overwhelm federal courts by causing the removal of resource intensive state class action cases to federal district courts while also increasing the burdens on state courts as class actions rejected by federal courts metamorphasize into numerous additional individual state actions. It is one-sided and includes numerous provisions that have little if anything to do with the problem of class action jurisdictional lines. We therefore strongly oppose H.R. 1115.

John Conyers, Jr.
Howard L. Berman
Jerrold Nadler
Robert C. Scott
Melvin L. Watt
Sheila Jackson Lee
Maxine Waters
Martin T. Meehan
William D. Delahunt
Robert Wexler
Tammy Baldwin
Anthony D. Weiner
Linda T. Sanchez

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[81] *See Ex Parte State Mut. Ins. Co.*, 715 So.2d 207 (Ala. 1997); *Ex Parte Am. Bankers Life Assurance Co. of Florida*, 715 So.2d 207 (Ala. 1997) (holding that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied).